UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

In re:

JERRY ALLEN JENNINGS

Debtor

No. 99-16549
Chapter 7

C. KENNETH STILL, TRUSTEE

Plaintiff

v.

JERRY ALLEN JENNINGS

Defendant

Adversary Proceeding
No. 99-1076

MEMORANDUM

Appearances: James D. Lane, II, Ray, Van Cleave & Jackson, P.C., Tullahoma, Tennessee, Attorney for Plaintiff

Cathy Grady Conley, Tullahoma, Tennessee, Attorney for Defendant

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The bankruptcy trustee brought this action to deny the debtor a discharge of all his debts. The complaint relies on Bankruptcy Code § 727(a)(3). It provides that the court can deny the debtor's discharge if "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." 11 U.S.C. § 727(a)(3). The objection revolves around the debtor's record keeping, or lack of record keeping, for his home construction business.

In this memorandum, the court is concerned with a motion to strike and a motion in limine filed by the trustee. The motion to strike asks the court to strike two documents filed by the debtor, the second answer and the "Statement of Expert Witness." The motion to strike also asks the court to prohibit the testimony of the expert witness, Evelyn Reid. The motion in limine asks the court to prohibit the debtor from introducing certain documents into evidence at the trial.

As to the expert witness and the documents, the trustee objects to their use at trial because the debtor did not produce the documents or reveal the intent to call the expert witness until long after the deadlines imposed by the court's pre-trial order.

The pre-trial order set the trial for October 19, 1999. The order included several deadlines. Some of the deadlines were set a certain number of days before the trial date. Thus, a change in the trial date would automatically changed these deadlines. The pre-trial order did not

follow this pattern with regard to the deadline for completing discovery. It set a specific date, September 17, 1999, as the deadline.

The pre-trial order allowed the parties to extend the discovery deadline by agreement. The parties filed a discovery plan on July 26, 1999, but did not change the discovery deadline. It did list Evelyn Reed as an accountant and a person whose deposition might be required.

On the same day that they filed the discovery plan, the plaintiff filed a motion to continue the trial. The parties submitted an agreed order that the court entered on August 13, 1999. The agreed order set the trial for December 7, 1999. Instead of changing the discovery deadline to sometime in November, the agreed order left it as September 17, 1999.

On November 23, 1999, the debtor filed a second answer to the complaint. The debtor's attorney stated that she filed it because she failed to find the original answer, which was filed in April 1999, and thought that one had not been filed. The answers are not exactly the same, but the court will consider that problem later. At the moment, the court is concerned only with the Statement of Expert Witness that, according to the trustee, was filed about the same time as the second answer. The statement is essentially an affidavit from the accountant, Evelyn Reid, concerning the debtor's financial records for his home construction business. It states, among other things, that she prepared tax returns for the past three years for the debtor doing business as Jennings Construction.

The trustee asserts that the statement should be stricken and Ms. Reid should not be allowed to testify because the intent to call her as an expert witness was not revealed before the deadline set in *Fed. R. Civ. P.* 26(a)(2), which was the deadline adopted by the court's pre-trial order.

The complete denial of a discharge is a harsh penalty that should not be inflicted upon the debtor lightly. *La Brioche, Inc. v. Ishkhanian (In re Ishkhanian)*, 210 B.R. 944 (Bankr. E. D. Pa. 1997). The court is reluctant to penalize the debtor's defense for delay in the discovery process. The new trial date is January 25, 2000. Before then, the trustee should be able to take Ms. Reid's deposition, if needed, and to conduct other discovery relevant to her testimony. In response to the trustee's motion to strike, the debtor's attorney asserts that she had difficulty finding Ms. Reid. The trustee has not disputed this. Furthermore, the trustee may be entitled to recover expenses due to the debtor's delay. *Alexander v. Local 496, Laborers' International Union of North America*, 177 F.3d 394 (6th Cir. 1999); *Miller v. Federal Express Corp.*, 186 F.R.D. 376 (W. D. Tenn. 1999); *BN1 Telecommunications, Inc. v. Fireworks of America Ltd.*, 236 B.R. 238 (Bankr. N. D. Ohio 1999). The court will exercise its discretion to allow the witness to testify despite failure to comply with the deadlines set by the rules or the court's scheduling order. *United States v. Cruz*, 156 F.3d 22 (1st Cir. 1998); *Fast v. Southern Union Co.*, 149 F.3d 885 (8th Cir. 1998); *Law Office of Larry A. Henning v. Mellor (In re Mellor)*, 226 B.R. 451, 457 (D. Colo. 1998). The court will not prohibit the debtor from calling Ms. Reid as a witness provided the trustee is able to conduct discovery relevant to her proposed testimony before the new trial date.

As to the "Statement of Expert Witness," its purpose is not clear. It was not offered in support of a motion for summary judgment. It may be nothing more than a discovery document

between the parties. Though it can remain in the file, the court will not consider it separately as evidence regarding the debtor's record keeping.

The court notes that, despite the debtor's identification of Ms. Reid as an expert witness, she will not necessarily be testifying as an expert with regard to the debtor's records because she acted as his accountant. *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 135 (3d Cir. 1980); *Inspiration Consolidated Copper Co. v. Lumbermen's Mutual Casualty Co.*, 60 F.R.D. 205 (S. D. N. Y. 1973); *Fitzpatrick v. Ploof Truck Lines, Inc. (In re Tennessee Valley Steel Corp.)*, Adv. Proc. No. 96-3100, Bankr. Case No. 94-32813, 1996 WL 808377, note 2 (Bankr. E. D. Tenn. Nov. 21, 1996). Whether Ms. Reid testifies as an expert or not is relevant to the deadlines imposed by Rule 26(a) and the court's pre-trial order. They impose different deadlines for expert and non-expert witnesses who may be called to testify at trial. *Fed. R. Civ. P. 26(a)(2), (3).* Rule 26(a)(2) imposes an early disclosure deadline for expert witnesses, and the court's pre-trial order adopts this deadline. As to non-expert witnesses, Rule 26(a)(3) imposes a deadline 30 days before the trial, but the court's pre-trial order shortened this to 20 days before the trial. Thus, the disclosure of Ms. Reid as a non-expert witness was not especially late.

Of course, this does not cure the problem that her identification as a witness came after the discovery deadline and near to the trial date. But this problem can be dealt with by allowing the trustee time for discovery and imposing costs on the debtor if requested by the trustee and if justified by the circumstances.

The same reasoning applies to the documents that were supplied to the trustee in November. The trustee needs time for discovery to analyze and investigate the documents. He should have ample time before the new trial date. The court will not exclude the documents solely because of the debtor's delay.

The next question is whether to strike the second answer. At the time the debtor filed the second answer, the debtor could have amended the original answer only with the court's permission. *Fed. R. Bankr. P.* 7015; *Fed. R. Civ. P.* 15(a). For the purpose of argument, the court will treat the second answer as a proposed amendment to the original answer. The court begins by examining how the second answer differs from the original.

Paragraph 6 of the complaint alleged that the debtor failed to produce records of the construction business and the debtor so testified at the creditors' meeting. The original answer admitted this allegation. The new answer admits the debtor did not keep the business's books and records in a professional or organized manner but states that the debtor has since produced and turned over to the trustee copies of cancelled checks, check ledgers, expense sheets for each house built in 1997 and 1998 and a profit and loss statement for the business.

Paragraph 7 of the complaint alleged that the debtor failed to offer any explanation for the lack of books and records for the business. The original answer denied this allegation. The new answer admits the debtor failed to offer any explanation but "in mitigation" states that the debtor was a small contractor with only three homes under construction in 1998, the year in which he filed bankruptcy.

The proposed amendment to paragraph 7 can not be prejudicial to the trustee. The statute allows the defense that the failure to keep, preserve or produce records was "justified under all the circumstances of the case." 11 U.S.C. § 727(a)(3). The debtor has the burden of proving the defense. *Bay State Milling Co. v. Martin (In re Martin)*, 141 B.R. 986, 997 (Bankr. N.D. Ill. 1992). The allegation of paragraph 7 is essentially a pre-emptive strike on the defense. It alleges that the debtor, *up to the time of filing the complaint*, had not explained the lack of books and records. The original answer denied this allegation, doubtlessly because the debtor still had the opportunity during the trial to provide an explanation. *Losinski v. Losinski (In re Losinski)*, 80 B.R. 464, note 10 (Bankr. D. Minn. 1987). The proposed amendment amounts to no change in the debtor's position. The original answer preserved the debtor's right to to offer an explanation at the trial. The proposed amendment admits the debtor's *prior* failure to explain and offers an explanation. The only difference is that the second answer expressly reveals the intent to offer an explanation at trial. Of course, the debtor's explanation probably will be based on the testimony of Ms. Reid and the documents produced in November. The change in the answer makes a significant difference only because of them. The court has decided that they should not be excluded solely because of the debtor's delay. Thus, the court sees no reason for denying the amendment to the answer.

Paragraph 6 presents essentially the same problem with one twist. It makes two allegations: (1) that the debtor, up to the time of the complaint, had failed to produce records, and (2) that the debtor so testified at the creditors' meeting. The meaning of the second allegation is unclear. It seems to mean that the debtor admitted at the meeting of creditors his failure to produce records. Of course, this understanding of the second allegation makes no difference; the same

reasoning that applied to paragraph 7 still applies to paragraph 6. Even if the debtor stated at the creditors' meeting that he would not produce any records, that would not prevent him from doing so in the future. On the other hand, such a statement would influence the trustee's preparation for trial. But the problem in preparation is the same. It involves the debtor's delay in producing the documents and proposing to call Ms. Reid as a witness. The court has already decided the delay does not justify excluding them. Thus, the court sees no reason for disallowing the amendment of paragraph 6.

The court will enter an order in accordance with this Memorandum.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

entered Jan. 6, 2000

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

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ORDER

In accordance with the court's Memorandum entered this date,

It is ORDERED that the plaintiff's motion to strike and plaintiff's motion in limine are DENIED;

It is FURTHER ORDERED that the trial of this adversary proceeding is continued to January 25, 2000, at 9:30 a.m., in the Bankruptcy Courtroom, U.S. Post Office and Courthouse, Winchester, Tennessee;

It is FURTHER ORDERED that the last day of the discovery period is January 14, 2000; and

It is FURTHER ORDERED that all other deadlines set out in the Order and Notice of Trial entered June 21, 1999, shall relate to the new trial date.

ENTER:

BY THE COURT

entered Jan. 6, 2000

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE